



**Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Prime Mortgage Corporation

**File:** B-238680.2

**Date:** July 18, 1990

Daniel E. Patt, Esq., for the protester.  
E.L. Harper, Office of Acquisition and Materiel Management,  
Department of Veterans Affairs, for the agency.  
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office  
of the General Counsel, GAO, participated in the preparation  
of the decision.

### DIGEST

Awardee did not meet definitive responsibility criterion in invitation for bids requiring bidders' possession of a \$100,000 working capital fund, where the contracting officer had no objective evidence that the awardee had working capital meeting the requirement.

### DECISION

Prime Mortgage Corporation protests the award of a fixed-priced contract by the Department of Veterans Affairs (VA), under invitation for bids (IFB) No. 533-29-90, to Herbert Realty & Management, Inc., a small business, for real estate sale closing services. Prime alleges that Herbert failed to meet the IFB definitive responsibility criterion that bidders have a \$100,000 working capital fund. This contract will cover calendar year 1990, with four yearly options.

We sustain the protest.

The contract is to assist VA in its foreclosure sales in the State of Michigan, and requires the contractor to conduct between 65 and 115 closings per month. The contractor orders title searches, prepares the closing packages (legal instruments and related documents), and conducts the closing of the real estate sale between the buyer and the selling broker. The contractor pays for all title searches and certain bills outstanding against the foreclosed properties--delinquent and outstanding taxes, past due water bills under \$700, and special assessments--subject to later reimbursement by either the buyer (at

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closing) or VA (by invoice). The IFB contained a provision entitled "working capital" that provides:

"Since it is the responsibility of [the contractor] to pay all title searches, delinquent and outstanding taxes, and water bills under \$700.00 before closing each property sale, it is essential that the successful bidder have adequate capital to cover a volume of such expenses while awaiting reimbursement. A \$100,000.00 working capital fund is a requirement of bidding companies."

VA received bids from two firms. Herbert submitted the low bid of \$134 per closing, while Prime submitted the second low bid of \$160 per closing. After making an affirmative determination of Herbert's responsibility, the contracting officer awarded the contract to that firm.

During the week prior to the award, Prime expressed concerns about Herbert's working capital to the contracting officer. The contracting officer stated that the decision to award to Herbert was based on: (1) Herbert's submission of a signed bid which the contracting officer interpreted to mean that Herbert met "all requirements by his self-certification," and (2) on Herbert's "Solicitation Mailing List Application", Standard Form 129 (SF-129)--showing a corporate net worth of \$200,000--which "provided further certification."

Prime then protested this decision to the agency. In its protest, Prime provided the contracting officer with a copy of Herbert's 1989 Michigan [corporate] Annual Report showing Herbert had negative stockholder's equity with working capital considerably less than \$100,000. The contracting officer then requested, and Herbert provided, information concerning three personal bank accounts of Herbert's owners. The requested information established that: (1) Mr. and Mrs. Herbert have a joint checking/savings account approximating \$50,000; (2) Mr. Herbert has an Individual Retirement Account (IRA) approximating \$50,000; and (3) Mrs. Herbert has an IRA approximating \$38,000. Because the funds in the three accounts exceeded \$100,000, the contracting officer denied the protest, concluding that this should satisfy the working capital requirement, and that

Herbert had the financial capability to perform the contract.<sup>1/</sup>

Prime then protested to our Office the alleged failure of Herbert to have a \$100,000 working capital fund. Since this requirement concerns a contractor's financial ability to perform the contract, it is a matter of responsibility. Sage Assocs. General Contractors, Inc., B-235497, Aug. 15, 1989, 89-2 CPD ¶ 141. Our Office will review an agency's affirmative determination of responsibility only if possible fraud on the part of contracting officials is shown or if the solicitation contains definitive responsibility criteria which allegedly have not been applied. See R.J. Crowley, Inc., B-229559, Mar. 2, 1988, 88-1 CPD ¶ 220. Definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement for the measurement of a bidder's ability to perform the contract. See Federal Acquisition Regulation (FAR) 9.104-2 (FAC 84-18). These special standards of responsibility limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance. Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398. In this case, there is no dispute but that the working capital requirement is a definitive responsibility criterion. In this regard, the \$100,000 working capital fund is a specific and objective standard that measures a bidder's ability to perform the contract.

Generally, a contracting agency has broad discretion in making responsibility determinations, including whether bidders meet definitive responsibility criterion, since the agency must bear the brunt of any difficulties experienced in obtaining the required performance. BMV Division of Harsco Corp., B-233081; B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67. Nevertheless, evidence that a bidder meets the definitive responsibility criteria must be obtained by the agency so that compliance with the requirement, which is a prerequisite to award, can be determined. Clausing Mach. Tools, B-216113, May 13, 1985, 85-1 CPD ¶ 533. Although the

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<sup>1/</sup> In the agency report on the protest, the agency apparently mischaracterized the timing of its consideration of those personal assets. The report states that before award the contracting officer asked for and considered the information concerning the three personal bank accounts to verify Herbert had the required working capital fund. However, in a letter in the file, dated only 2 days before the report, the contracting officer states he requested and considered this information only after receiving the protest.

relative quality of the evidence regarding responsibility matters is a matter for the judgment of the agency, the contracting officer may only find compliance with the definitive responsibility criteria based upon objective evidence. Vulcan Eng'g Co., B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403 at 7; Ampex Corp., B-212356, Nov. 15, 1983, 83-2 CPD ¶ 565; Power Sys., B-210032, Aug. 23, 1983, 83-2 CPD ¶ 232.

VA contends the decision was reasonable because Prime's general allegations before award were not a sufficient reason to cause the contracting officer to doubt that Herbert met the working capital requirement, since Herbert "self certified" that it met the requirement. Moreover, VA alleges that the SF-129 showing \$200,000 "net worth" supported the contracting officer's judgment.

Our review of the record shows that the contracting officer had no objective evidence when he made the award that Herbert had a \$100,000 working capital fund as required by the IFB. A bidder's signature on its bid alone is not evidence, much less objective evidence, that the bidder met definitive responsibility criterion contained in the solicitation. See Haughton Elevator Division, Reliance Elec. Co., 55 Comp. Gen. 1051 (1976), 76-1 CPD ¶ 294 (agency may not ignore definitive responsibility criteria in making award); see also FAR § 9.103(b) (FAC 84-18).<sup>2/</sup>

The certification on the SF-129, "Solicitation Mailing List Application", that the corporation had a \$200,000 net worth and \$200,000 average annual sales or receipts does not indicate the corporation had a working capital fund in excess of \$100,000. In this regard, working capital is current assets less current liabilities,<sup>3/</sup> while net worth

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<sup>2/</sup> FAR § 9.104-2 (FAC 84-39) authorizes the contracting officer's development of special standards of responsibility. We refer to these special standards as definitive responsibility criteria. FAR § 9.105-1(a) (FAC 84-39) requires the contracting officer to possess or obtain information that the prospective contractor meets the special standards. FAR § 9.105-1(c)(3) (FAC 84-46) states that a prospective contractor's financial data is a source of information to support a determination of responsibility.

<sup>3/</sup> Barron's Dictionary of Accounting Terms (Siegel/Shim, 1987) defines "WORKING CAPITAL [as] current assets less current liabilities, properly called net working capital. Working capital is a measure of a company's liquidity. Sources of working capital are: (1) net income, (2) increase

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concerns the valuation of all corporate assets in relation to liabilities.<sup>4/</sup> That is, working capital is a measure of the corporation's liquidity to meet its on-going obligations while net worth measures the overall valuation of the corporation. Without considering such factors as current expenses and current liabilities, the average annual receipts figure does not indicate the amount of working capital.

In any case, the definitive responsibility criterion references a \$100,000 working capital fund which reasonably indicates a readily accessible \$100,000 pool of money that can be utilized to cover a large volume of closing expenses while awaiting reimbursement. The contracting officer here had no objective evidence at the time he made award that Herbert had such a pool of money.

The three personal bank accounts now cited by the agency as showing Herbert had a \$100,000 working capital fund were not only not considered by the contracting officer in making his affirmative responsibility determination, but do not constitute a working capital fund of the corporation. In this regard, nothing in the record shows that the funds in the accounts were either the property of the corporation or at the corporation's disposal to meet corporate needs. To the contrary, the bulk of the funds were the personal retirement accounts of the corporation's officers and would not ordinarily be used to satisfy on-going corporate outlays.

Based on the foregoing, the contracting officer had no reasonable basis to find that Herbert met this definitive

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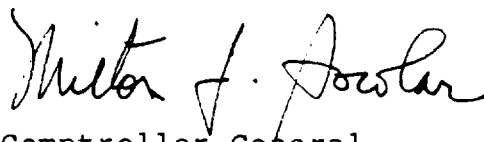
in noncurrent liabilities, (3) increase in stockholder's equity, and (4) decrease in noncurrent assets." P. 460.

4/ Kohler's Dictionary for Accountants', 6th Ed. (Cooper/Iyiri, 1983), defines "Net Worth" [as] "(=owners' equity). The aggregate appearing on the accounting records of the equities representing proprietary interests; the excess of the going-concern value of assets over liabilities to outsiders; of a corporation, the total of paid-in capital, retained earnings, and appropriated retained income." P. 346.

responsibility criterion. Accordingly, we sustain the protest.<sup>5/</sup>

Under the circumstances, Herbert should have been found nonresponsive and, since Herbert is a small business concern, this matter should have been referred to the Small Business Administration under certificate of competency procedures. See Baxter & Sons Elevator, Co., Inc., 60 Comp. Gen. 97 (1980), 80-2 CPD ¶ 414. In light of the fact that more than 50 percent of the basic contract term (calendar year 1990) is completed, we believe that the best remedy is to allow Herbert to complete the basic term if performing adequately. We recommend that the contract options not be exercised, and that the agency resolicit for its requirements after 1990.

Prime is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d). The protester is also entitled to recover its costs of preparing its bid. Id. Prime should submit its claim for costs directly to VA. 4 C.F.R. § 21.6(e).

*for*   
Comptroller General  
of the United States

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<sup>5/</sup> Prime also objects to VA's failure to enforce the solicitation requirement that the contractor furnish a surety bond within 10 calendar days after award. Whether Herbert furnishes the required bond is a matter of contract administration within the discretion of the contracting agency which is a matter not subject to review under our Bid Protest Regulations. 4 C.F.R. § 21.3(m)(1) (1990).